

Trial Testimony Designations for:
In Re: W. R. Grace & Co., et al.
(U.S. Bankr. Ct., Dist. of Delaware, Case No. 01-1139)
January 14, 2008

Deposition Designation Key

Arrowood = Arrowood Indem. Co.
f/k/a Royal Indem. Co. (Light Green)

BNSF = BNSF Railway Co. (Pink)

Certain Plan Objectors "CPO" = Government Employees Insurance Co.; Republic Insurance Co.
n/k/a Starr Indemnity and Liability Co.; OneBeacon America Insurance Co.; Seaton Insurance
Co.; Fireman's Fund Insurance Co.; Allianz S.p.A. f/k/a Riunione Adriatica Di Sicurtà; and Allianz
SE f/k/a Allianz Aktiengesellschaft; Maryland Casualty Co.; Zurich Insurance Co.; and Zurich
International (Bermuda) Ltd.; Continental Casualty Co. and Continental Insurance Co. and
related subsidiaries and affiliates; Federal Insurance Co.; and AXA Belgium as successor to Royal
Belge SA (Orange)

CNA = Continental Cas. Co & Continental Ins. Co. (Red)

FFIC = Fireman Funds Ins. Co. (Green)

FFIC SC = Fireman Funds Ins. Co. "Surety Claims" (Green)

GR = Government Employees Ins. Co.; Republic Ins. Co. n/k/a Starr Indemnity and Liability Co.

Libby = Libby Claimants (Black)

OBS = OneBeacon America Ins. Co. and Seaton Ins. Co. (Brown)

PP = Plan Proponents (Blue)

Montana = State of Montana (Magenta)

Travelers = Travelers Cas. and Surety Cos. (Purple)

UCC & BLG = Unsecured Creditors' Committee & Bank Lenders Group (Lavender)

AFNE = Assume Fact Not in
Evidence

AO = Attorney Objection

BE = Best Evidence

Cum. = Cumulative

Ctr = Counter Designation

Ctr-Ctr = Counter-Counter

ET = Expert Testimony

F = Foundation

408 = Violation of FRE 408

H = Hearsay

IH - Incomplete Hypothetical

L = Leading

LA = Legal Argument

LC = Legal Conclusion

LPK - Lacks Personal Knowledge

LO = Seeking Legal Opinion

NT = Not Testimony

Obj: = Objection

R = Relevance

S = Speculative

UP = Unfairly Prejudicial under Rule 403

V = Vague

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. January 14, 2008
. . 8:50 a.m.
.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 we ought to proceed with that.

2 I believe that we've reached agreement among counsel
3 that the side of the room that stands for truth and justice
4 over here gets two hours, and then the other side of the room
5 that stands for truth and justice gets two hours, and then we
6 all will have an hour for rebuttal. That's a half hour per
7 side, so -- I'll be going this morning for about two hours, and
8 I'd like to take a break I think halfway through that process
9 to catch my breath and to set up a couple of different things,
10 and then I'll finish up, and they'll go a half hour
11 (indiscernible) --

12 THE COURT: That's fine.

13 MR. BERNICK: I understand that the video system is
14 hooked up, so the next thing is --

15 THE CLERK: You can't step away, sir.

16 MR. BERNICK: Maybe just put on the screen, it will
17 be visible to Your Honor, and visible back on those screens,
18 and then all those (indiscernible).

19 Let me start out with some introductory remarks, Your
20 Honor. I'm not going to go back, because of the long history
21 of the case. We've done enough of that in this courtroom. But
22 I want to make an observation that really lies at the heart of
23 the estimation issue that brings us here, which is that Your
24 Honor is going to hear about a very unusual bubble, a bubble
25 that drives the estimation that's being done by the plaintiffs

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1 in this case, and that drives the estimation literally billions
2 of dollars worth of claims that have now been dealt with in the
3 course of bankruptcy, and also drives, therefore, literally
4 billions of dollars that have now been set up in a series of
5 trusts.

6 The bubble really began just before Grace went into
7 Chapter 11, and that was a bubble of claims. It was a very
8 dramatic increase of claims. It was an overwhelming increase
9 of claims. It was an unmanageable increase of claims. It was
10 an increase in claims that we know today had absolutely no
11 basis in medicine, and no basis in law. But the fact of the
12 matter was that Grace and its various constituencies didn't
13 really have an alternative to try to deal with that problem.
14 The fact of the matter was that it couldn't be managed, and the
15 only recourse was, therefore, Chapter 11. Sometime,
16 ironically, about the same time, there was another problem.
17 That was the stock market bubble. And that also was --
18 (indiscernible) exuberant. It was unmanageable. It seemed
19 like it might go on forever. Nobody knew what, ultimately,
20 would come of it. But the time came when that bubble burst,
21 and people were in denial for a period of time, but eventually
22 they got up and about their business, and they went on to
23 create another (indiscernible) we'll call the real estate
24 bubble. That's a story for a different day.

25 The claimants here, both the ACC and the FCR, have

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1 into, well, what was the basis for that statement? And it
2 turns out that the basis of that statement was not this --
3 having established that the estimates were predictive of a
4 company still in the tort system, but rather they were
5 predictive of the experience of a bankruptcy trust, which, of
6 course, has a much different situation in established criteria.
7 It has pay outs that are all fixed in amount with -- subject to
8 some adjustments over time, a totally different beast from the
9 huge volatility that a litigant sees during the course of the
10 litigation process. it turns out that there was only one
11 estimate, one estimate that he could even think of of a company
12 that he had done at a company still in the tort system where he
13 said it still had some predictive value. And that was a
14 private estimate that he says that he did of W.R. Grace, never
15 been published, never been reviewed.

16 So, if we go to Peterson 80, we now see -- any others
17 beyond Grace. (Indiscernible) any other forecast for a company
18 not (indiscernible) bankruptcy that's been shown to be accurate
19 for a period of five years or more? Answer: "I've done
20 forecasts for other companies, but I don't know whether or not
21 -- I haven't had a chance to look at the back up data, so I
22 can't answer that yes or no." No record of predictability.
23 Only a record of unpredictability.

24 Why is it that it should be so difficult to predict
25 even a few years out? The answer is very simple. The

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1 basic parameters, exposure, dose, risk and diagnosis of
2 disease. We then used, we deployed exactly the right and very
3 well established scientific disciplines, industrial hygiene,
4 epidemiology, and quantitative statistics, and medicine, and
5 here are the experts that we have brought to bear in connection
6 with this work. Lee and Lees (phonetic), Mugavaker (phonetic)
7 and Anderson, Weill, and Henry Parker, all people who are
8 experts in these underlying disciplines. Notably, there is not
9 a single expert in this case on the other side in any of these
10 disciplines who has sought and undertaken to perform the same
11 kind of analysis. These people are all available, but you
12 don't see any of them saying, oh, well, gee, we have developed
13 a different epidemiological model, and here's the output. They
14 quarrel with (indiscernible) from our analysis, they propose no
15 alternative model, no alternative estimate based upon an
16 alternative deployment of these established scientific
17 disciplines. At the end of the day their whole model says
18 forget all of that stuff. We've got a person named Dr.
19 Peterson who is a Ph.D. and a lawyer. We've got a person named
20 Ms. Biggs, who has a background in statistics, I believe. We
21 have Mr. Staylor, who has got a background in statistics. We
22 don't have people who actually go through and construct this
23 kind of model because we're not engaging in that enterprise.

24 The next slide. This flow chart that we've developed
25 is probably extremely difficult to ascertain from the expert

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1 reports, but we've laid it out here. And essentially what
2 we're doing is we're taking -- remember, we see the same
3 building blocks, exposure, dose, risk, and diagnosis of
4 disease. So, we start out by taking a look at the kinds of
5 activities in which claimants against Grace as of April of '01,
6 the kinds of activities in which they engaged, in terms of did
7 they mix asbestos containing products, did they remove their
8 (indiscernible), did they install, they were at a site, or they
9 were in a space? And, of course, the questionnaires asked for
10 this information flat out, and we know that almost nobody
11 filled out the questionnaires because they decided they didn't
12 want to. So, what we had to do, and again focusing
13 specifically on mesothelioma, we actually read all the
14 mesothelioma files in order to find out, well, what is it that
15 they said they did with Grace asbestos?

16 Now, it will be said, oh, well, there's all kinds of
17 evidence that might be introduced with respect to what these
18 people actually did, that maybe we wouldn't have gotten until
19 the time of trial, and that's been a constant refrain. There
20 are two answers to that, actually, three. And we'll take them
21 up in more detail later. But the key thing about what we did
22 with exposure, we did with exposure, is we relied upon the
23 claimants themselves to say what they did, and certainly the
24 claimants themselves ought to be able to say what they did.
25 That doesn't take time to evolve for trial. That comes from

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1 the claimant. Now, the calculations based upon that, that's
2 more involved. We rely upon them for the calculations. We
3 relied upon them to simply talk about what it is that they did.
4 And they are the best sorts of information with respect to what
5 it is that they did.

6 We then took the next step. We now need exposure and
7 dose. Let's go back to that first slide. We're going to fill
8 it in. We're going to find out, okay, what's the exposure and
9 dose associated with these activities? What, then, is the
10 maximum lifetime exposure? And we assumed that these people,
11 and they said they did, we assumed that they did it for an
12 entire lifetime. What, then, is the ultimate risk that comes
13 from the epidemiological studies? Then we take a look at
14 diagnosis of disease, the medical screen, and we'll talk about
15 that. And then we took both of the outputs in order to create
16 a grid of considerations that then applied to each claimant
17 pursuant to the P.I. cues. So, we have exactly a by the book,
18 exposure, dose, risk assessment, screening process, using
19 exactly the same disciplines that have been at the core of
20 epidemiology, industrial hygiene, and diagnostic medicine for
21 years, and years, and years.

22 When we find out the exposure and dose -- next slide,
23 please. That's Slide 13. This table indicates down at the
24 bottom A through E, those are the exposure categories, what the
25 industrial hygienist did is to look at all of the available

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1 industrial hygiene data to find out, well, what is -- what
2 would be the mean eight hour that is time weighted average air
3 concentration that these individuals would be exposed to?
4 Following an absolutely traditional analysis. And what we can
5 see is that here's a figure from Nicholson. Here's the
6 Nicholson construction trace 58 to 72, 73 to 79. You can see
7 how high they were for construction as compared to these
8 people. These people didn't have that kind of exposure. And
9 it may well be that they had exposure later on. But in any
10 event, these are people who were involved in construction
11 trades. The application of this kind of product, in the
12 cutting and removal, etcetera, etcetera, being at the site, is
13 a lower level activity than many of the other construction
14 trades, which would have included people who were actually
15 working with insulation and other more toxic products. So, the
16 industrial hygiene data was all illustrative down here.

17 If we focus on B, D, and E, see how small they are?
18 We're now going to zoom in on get bigger on B, D, and E. We
19 can see that even there, this is now the OSHA permissible
20 exposure limit, .1. These are trades that are below even the
21 (indiscernible). This is what the data actually shows in all
22 cases. So, this now gave us a rubric of data. We now had to
23 apply it to create a lifetime dose. That's the next step.
24 Next slide, please.

25 So, what did Dr. Anderson assume? She'll be

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1 testifying about this. She assumed that all of the exposures
2 were only to Grace products. Any exposure we had was to a
3 Grace product, as long as it's indicated there. If you worked
4 with a non-Grace product any day of the -- 11,250 is lifetime
5 exposure, obviously that's very conservative, and if you worked
6 with any non-Grace product, that would take a day away from the
7 Grace exposure. If you worked in an alternative occupation,
8 then the cumulative exposure associated with Grace products
9 actually declined. So, these are the assumptions, extremely
10 conservative. Next slide.

11 On the basis of these assumptions you then end up
12 with a certain number of 45 year, that is lifetime cumulative
13 exposures, assuming that constant exposure driven by the
14 industrial hygiene data, you can see, now, A is 17, B is 2.1, C
15 is 12, D is 1.3, and 1.5. Now, when it comes to B, D, and E,
16 which are so low, we took a further look to see, well, how many
17 people actually, under the plaintiff population, the ones who
18 gave us enough data for us to determine how long they were
19 actually exposed, how many of them actually were exposed at
20 that level? Are these numbers skewed by a few cases of higher
21 exposures? And we found out that the latter was true. This is
22 --

23 THE COURT: Would you go back? I'm sorry. Go back
24 to the prior slide for a minute, please.

25 (Pause)

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1 THE COURT: Okay. Thank you.

2 MR. BERNICK: Thank you, Your Honor. And we found
3 out, as it turns out to be true, that you can actually take the
4 people who gave us enough information for us to actually find
5 out how long they actually did work with the product, that what
6 we find out is that the actual numbers for B, D, and E are not
7 as high as indicated on the prior slide, that overwhelmingly
8 they're below one fiber per millimeter a year. So, it's below
9 one for it looks like about anywhere -- anywhere close to --
10 maybe 95 percent of the cases. So, the numbers you saw on the
11 prior page are actually extremely conservative numbers.

12 What, then, does that enable us to do? Well, now,
13 with those kinds of risks -- go back to the prior slide,
14 please. With these kinds of lifetime exposures, what is the
15 risk that's associated with that? That's the next step. Very
16 traditional next step. Risk assessment analysis used by the
17 federal government in a thousand different offices every hour
18 of every day of every year.

19 Let's go to the next slide. What we've done here is
20 display the epidemiology, because epidemiology tells you about
21 risk. And under the epidemiology, what you're always looking
22 for is a dose and a response. So, here we have, on the
23 horizontal axis, we have the dose, the cumulative dose,
24 (indiscernible) units, and here we have response in the sense
25 of do you have an excess of disease in the population, which is

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1 what the epidemiology look to. That is, in each given dose we
2 have data that says that that dose, down here, here's what the
3 relative risk is, the relevant risk would be over on the
4 vertical column. What we've done is, you see, we now have a
5 very nice dose response curve. Gee, that's just terrific. And
6 what that says is that there's actually a regularity in the
7 relationship between dose and response, exactly what you'd
8 expect with a well established potential carcinogen, based upon
9 epidemiological data. But we see, in fact, that there are
10 limits to what you can observe. We have a limit in the sense
11 of what the actual data points in the studies establish. These
12 are mostly studies that took place at very, very high levels.
13 That's where the dose response relationship was well observed.
14 At lower doses the robustness of the data, that is, do you even
15 have data that shows that there's an increased risk, diminishes
16 significantly. And when you get down here, that is we don't
17 know if we're seeing -- actually seeing something that is real,
18 and as you get down -- way down here, this is very interesting.
19 In this we actually have studies that looked for risks and
20 didn't find them, that is, that measured those actual doses and
21 said we do not see an excess. So, you would say that at that
22 level a variety of different things might occur. And we're
23 going to get to that in the next slide. So, this is
24 observation. This is now inference. The data is not hard.
25 This you've got hard data that says you don't actually have a

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1 risk.

2 What do we do about this low area, this inference --
3 inference, in a sense negative area? The answer is that a lot
4 of very smart people spent their lives working on that very
5 question for the last 20, 25 years. What do you do about
6 exposures that are in an area where there is not scientifically
7 observable relationships? You don't find statistically
8 significant associations using reliable data? What do you do
9 in that area? And it's a real issue, because we have chemicals
10 that are present in the environment, and in the workplace. And
11 radiation, you had people working in the (indiscernible), and
12 the power utility complex, all exposed to low levels. You can
13 say, well, we don't want to have anything, and then the
14 operation would shut down. So, people spent a long time
15 saying, well, where do we really think that the key lies here?
16 What should we do? Go to the next slide, please.

17 And so, you have this kind of problem, the data here.
18 You then have a limitation. What do you do in the zone of
19 interest? Next slide, please. The answer is that for public
20 health purposes, like the EPA, they develop models that have no
21 threshold, that go all the way down to zero dose and find, not
22 find, but state that they are assuming that there is a risk,
23 whereas the actual potential response is, that is what the
24 truth might be, could be beyond that line, or below that line,
25 it could be above that line, conceivably. Actual responses,

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1 though, are not known. So, the models, which also have been
2 quoted for the proposition that, well, every little dose
3 carries with it risk. Sure, that's true in a modeling health
4 protective sense. It is not true in a scientific sense when
5 you get down to doses that are that low.

6 So, how does this, then, now relate back to our
7 problem? Next slide. The other sides' experts, all of them,
8 admit, Dr. Wadley (phonetic) admits, next slide, Dr. Hammar
9 (phonetic) admits, another one of their experts, next slide,
10 Dr. Lehman (phonetic), that's another one of their experts,
11 they all admit that there probably is a threshold, that is, it
12 really doesn't go all the way down to zero. It kind of goes
13 along the bottom line, and then it pops up some. So, it's a
14 threshold situation. What they disagree about, they disagree
15 about how low that threshold goes. So, Your Honor will see --
16 this is the next slide -- that there are different studies that
17 are being used. We believe that we have all of the studies
18 that matter. They also uniformly -- we have an area where risk
19 is not measurable, not detectable, not present. They have a
20 few studies that, Your Honor, we would submit, even -- show the
21 next slide -- they even confess -- next slide -- that they have
22 limitations on what can actually ascertained from their data.
23 So, we have a series of limitations. Number one, they don't
24 use actual industrial hygiene data. For example, they report
25 as fiber millimeters per year, with quotes, indicating that

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1 they actually haven't measured it. They -- going down -- they
2 use job titles instead of having actual airborne asbestos
3 information, which you would need. The results are generic.
4 They are unable to make distinctions of risks for different
5 fiber characteristics. They can't render opinions with any
6 degree of scientific certainty. The (indiscernible), in many
7 cases, say it would be assumed that the measured levels -- the
8 levels that are being used are assumed, not measured, and
9 therefore they have reliability issues.

10 But under any set of circumstances, we are talking
11 about a situation where everybody agrees that the fact that
12 there is a threshold, and where it is clear -- let's put up
13 that slide -- that we are talking about risks that are
14 extremely small. Next slide, please.

15 So, what do we reach as a conclusion with regard to
16 these types of exposures? With respect to B, D, and E, they
17 cannot be demonstrated in a scientifically sound manner that
18 these people had sufficient cumulative exposures to cause
19 disease. Exposures have not been demonstrated scientifically
20 to contribute to a risk of disease, and therefore these claims
21 are being set aside. They don't make it past the Daubert
22 standard that says it has to be scientifically demonstrable.
23 The (indiscernible) of the -- disciplines, the methodologies
24 established in this area say it is not scientifically
25 observable. Do we say, however, that we consider whether they

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1 might substantially contribute, or are we relying upon the
2 doubling of dose standard to say we're excluding these people?
3 And the answer is we are not excluding B, D, and E, based upon
4 the doubling of risk dose. We are, in fact, considering
5 whether there is evidence that they would -- these exposures
6 were a substantial contributing factor. That's what Dr.
7 Anderson does. They have mis-characterized Dr. Anderson's
8 report, and her testimony to say otherwise. Dr. Anderson
9 specifically considered whether the data showed substantial
10 contribution, and given the very minuscule levels of exposure
11 that we're talking about here, her conclusion was that it did
12 not -- there was not scientifically ascertainable evidence that
13 there was a substantial contribution.

14 Now, does that mean that there is no theoretical
15 risk? Well, of course there's always a theoretical risk. The
16 EPA model assumes theoretical risk. The EPA model assumes that
17 every little bit that you add causes or has an effect. But the
18 line is a policy statement, and the line is a guidance that is
19 stronger than the science. The science doesn't take you down
20 to these very low levels, and show a positive increase of risk.
21 (Indiscernible) studies do not show you a positive increased
22 risk. And even at higher levels, that last solid line that you
23 see doesn't say that as you get down, tiny, tiny, tiny, in each
24 fiber, that, in fact, there is a detectable increase in risk.
25 It doesn't say that. It says that for purpose of establishing

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1 a general relationship of dose and response, yeah, higher
2 levels of exposure have been shown to have higher levels of
3 risk. It doesn't say that if we had .5, or one fiber
4 millimeter per year, that, in fact, you observed any increase
5 of risk.

6 Your Honor I will also observe that if you take those
7 -- let's go back a couple of slides. Back more. Dose. Dose.
8 More. Ah. If you assume the models, you go all along that
9 curve and assume it's totally solid, it -- and you had studies
10 at each and every point along the way to measure, measure,
11 measure. Let's assume that you had that. And you assumed,
12 therefore, that every increment of exposure carried with it an
13 actual risk as opposed to a theoretical risk, you're talking
14 about risk contributions that are not substantial. You're
15 talking about risk contributions that are minuscule risks,
16 risks that are of the order of magnitude of dying by drowning
17 in your lifetime. Those are the kinds of risks that we're
18 talking about. They are not -- the idea that any increase,
19 theoretically, in risk, means substantial contribution enjoys
20 no support in the law, and enjoys no support scientifically.
21 The data doesn't get you there. There is no study that starts
22 here and then goes -- let's go a little (indiscernible) -- that
23 defines -- oh, yes, by God, we can see a risk. That's not the
24 way the science works.

25 So, then, we then go to the -- let's go through a

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1 couple more slides, back to where we were. Beyond that.
2 Disease screens. We're not going to spend as much time on
3 disease screens. Your Honor is familiar with this. These are
4 the screens that we used. It would have to be a one slash
5 zero, and to have the circumstances, must be greater than --
6 has to be one slash zero or more, not greater than. And it has
7 to be -- x-rays have to be done in compliance with the actual
8 standards that are set forth by the ILO. The same thing with
9 the PFD. And then we have a screen for (indiscernible) cancer.

10 We have taken out the screens that are litigation
11 screens as unreliable. And why did we do that? Let's go
12 through the next couple of slides. The ILO, which talks about
13 how these x-rays are to be used, actually sets out a standard
14 for how they should be conducted. So, we've (indiscernible)
15 Daubert, and reliable evidence, we go to a set standard that's
16 established by the ILO and NIOSH themselves about what must be
17 done in order to produce a reliable result. And this says --
18 we'll take the next slide -- where you have a contested
19 proceeding, NIOSH recommends a minimum of two independent
20 classifications by appropriately selected readers with a third
21 classification if the first two disagree. You have to have
22 three different readings, two of which got to be right. And
23 they should be blinded. They should be blinded.

24 So, what is it that we did? Next slide, please. We
25 did a study, the Henry study. Remember, we asked for all those

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1 x-rays. And we sent them out to be re-read. We sent them out
2 on a blinded basis, the number of readers was determined in
3 advance, not ad hoc. We (indiscernible) with strong
4 credentials, and controlled inputs, that is, we sent -- the
5 plaintiffs' lawyers sent in the actual x-rays. And then we
6 also did something else. We used control films, so we could
7 see whether the readers were over-reading or under-reading in
8 some kind of biased fashion. And we found out, in fact, that
9 they didn't. So, what, then, happened? What were the results?
10 If we take plaintiffs' alleging radiographic evidence of
11 asbestos related disease, we used x-rays, all of which came
12 from plaintiffs, who said that they were relying upon the x-ray
13 in order to establish that their lung cancer was asbestos-
14 related, that is to establish evidence of fibrosis. In 82
15 percent of the cases, the claimants' readers made a finding of
16 one slash zero. How many of those were establishable in
17 accordance with the standard? Seven percent. So, when you
18 actually comply with the standard, the data that's being
19 submitted, although it says 82 percent actually show an ILO
20 positive reading, we only had seven that are replicated in
21 accordance with the standards. And we would note that 90
22 percent of those have a significant smoking history. There
23 were a variety of things that could cause the finding on a B
24 Read.

25 Next slide. We also, then, in the study, eliminated

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1 those people -- took a look at how many of those people
2 actually were seen by doctors who are no longer accepted by the
3 trusts, or B Reads, or other doctors who we know by virtue of
4 their testimony and how they actually -- depositions were
5 taken, we know how they actually conducted the B Reads, and
6 they didn't do the B Reads in accordance with the standards by
7 their own admission. So, we took those folks out, as well.

8 Next slide. What then happens? This is now -- the
9 flow chart has been filled out. We have the A, B, E, D, and E,
10 the different exposure categories, the eight hour PWA's, the
11 maximum exposures over the lifetime, and therefore, then, using
12 our risk models, we said with respect to B, D, and E, they are
13 too low to have even scientifically observe the -- even
14 present, even to exist. With respect to A and C, we say there
15 is a potential risk. We don't enough to say that it's there,
16 but it's good enough for this case, so we let them through.
17 And then we then apply to the population the screens that we've
18 indicated.

19 What, then, comes out at the other end? At the other
20 end, therefore, we have, using the same basic elements of risk
21 assessment, we go through those plaintiffs who have claims
22 pending as of the filing of bankruptcy. We know that a certain
23 number of them did not actually complete the PIQ, or the proof
24 of claim. Because they're -- if they haven't picked up a proof
25 of claim, they're not included under Bankruptcy Rules, and they

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1 expert report we've put before the Court would be a rebuttal
2 witness. We note that Dr. Heckman was not the subject of a
3 Dalbert challenge and so the equity committee never answered
4 any Dalbert motion that was made against us.

5 THE COURT: All right.

6 MR. HOROWITZ: That's it. Thank you, Your Honor.

7 THE COURT: Okay. How long do you think it will take
8 you for lunch to get wherever you are going to go? I mean to
9 get everyone out and back I think it usually takes about an
10 hour so I mean keep it as short as you like, but I think much
11 less than an hour doesn't work in this building very well. An
12 hour, okay see you back at one o'clock then. We are in recess
13 until one.

14 (Lunch recess)

15 THE COURT: Please be seated. Who is next?

16 MR. LOCKWOOD: I am Your Honor. I will be right
17 there.

18 THE COURT: Okay, Mr. Lockwood.

19 MR. LOCKWOOD: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. LOCKWOOD: This is somewhat unusual combination
22 of occurrences here because unlike the normal situation where
23 you would have motions in limine/Dalbert type exercises
24 separate from opening statements, as Mr. Bernick has
25 demonstrated and as we agreed we are basically combining the

1 fact that as a general proposition you don't have bar dates in
2 524G plan context because there is no perk if you are not -- if
3 the trust is going to resolve the claims and not the bankruptcy
4 court. The purpose of a bar date is generally in a bankruptcy
5 case to indemnify the claim so that they can then be allowed or
6 disallowed and that was not going to be the purpose for this.

7 Instead the purpose was to enable the Court to have
8 jurisdiction to award sanctions if it felt they were
9 appropriate against claimants who declined and failed to take
10 the second mechanism, or to accomplish a second mechanism which
11 Grace has in this bankruptcy which is the personal injury
12 questionnaire or PIQ.

13 That PIQ again after much debate in front of the
14 Court was set out and was for the expressed and stated purpose
15 by Grace and has been argued throughout Mr. Bernick's
16 presentation today and in his papers, for the purpose of
17 generating information that would supposedly provide the
18 necessary, in Grace's view, evidence that would tell the Court
19 whether the claim of the person filling out the questionnaire
20 was or was not valid.

21 The third mechanism that Grace is proposing in its
22 so-called merit based or legal liability estimation is that
23 Grace is submitting the testimony of a group of experts in
24 medicine, industrial hygiene and risk analysis. To opine on
25 the legal inadequacy from the standpoint of their particular

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1 disciplines, medicine, risk analysis, industrial hygiene of
2 tens of thousands of claims. And the final step in this
3 process is the submission of the wrap it up testimony of an
4 expert Dr. Thomas Florence who jettisons as the record will
5 show, Your Honor, when we get to the actual evidence in this
6 case, who jettisons his customary methodology of doing
7 estimations to do what amounts to really a fairly simple
8 mathematical tally of all of the claims purportedly invalidated
9 by the experts, the previous group of experts. And then it
10 takes the percentage of the surviving valid claims which is
11 needless to say very low and extrapolates that to the future to
12 allegedly demonstrate that the simpler, very low percentage of
13 claims in the future would be legally valid.

14 It should be noted that none of these witnesses
15 assuming that they could otherwise do it, which I don't believe
16 they could, none of these witnesses is a lawyer. None of these
17 witnesses is going to tell the Court, assuming that the Court
18 will permit them to do so, what the actual legal requirements
19 are and how those legal requirements and the state courts where
20 these claims were filed and whose law the Court is obligated to
21 apply, how that law fits, if you will, with these opinions
22 about medicine, risk analysis, industrial hygiene.

23 The -- after having sort of put Dr. Florence on the
24 number and these other experts for the number and amounts of
25 the present and future claims and the validity, the validity of

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1 those claims and sort of rejecting out of hand the expert
2 testimony from the ACC and FCR as not fitting because they
3 aren't opining as to the legal liability of Grace. And the
4 basis of which their testimony is generally being rejected is a
5 combination of it relates to the tasks where the tort system
6 was broken, not is anymore but was broken, and to Rule 408
7 which we'll discuss later.

8 But having done all of that Grace then has to put a
9 dollar figure on these claims. How does it do that? Well it
10 gets Dr. Florence to value this reduced universe of legally
11 valid claims that he's come up with here by using the amounts
12 paid in settlements. Not judgments where juries and courts can
13 determine the legal validity of the claim or the amount that
14 the defendant Grace could be legally obligated to pay for the
15 claim. No settlements and more only settlements of six cases.
16 Now Mr. Bernick went through a long to do about how gee, if he
17 used more cases he could have come up with lower values. So
18 they are really getting generous to us in using six cases as
19 the starting point for the valuation. And as another one of
20 Mr. Bernick's charts demonstrated all the other values for all
21 the other claims are in Dr. Florence's methodology, while they
22 are not obtained by valuing those other claims by the
23 historical amounts, they are claimed by deriving the values as
24 ratios of the value, the settlement value of those other claims
25 to the settlement value of the six mesothelioma claims.

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1 So everything, the entirety of this number that Dr.
2 Florence comes up with here is dependent upon the value. (A)
3 the values on these six meso claims and (B) the proposition
4 that they can use those settlement values for that purpose,
5 notwithstanding their insistence that this is a merits based
6 analysis which presupposes that some courts and/or jury
7 somewhere is going to decide whether the claim is valid and
8 what it is worth.

9 Then where is Grace going to go with that number if
10 the Court accepts it? Well as long as the Court comes up with
11 a number that is no more than the \$1.6 billion for whatever the
12 PI portion of the combined PI PD number is, we don't -- since
13 we don't know yet what the PD number is the PI portion of that
14 is kind of a moving target. But it's obviously somewhere south
15 of 1.4 billion because Grace has already settled a couple of
16 hundred million dollars worth of PD claims.

17 Grace is going to cram that down on the asbestos
18 classes. And assuming that it can do that, the effect of it
19 would be to fund the 524G trust with the PI portion of the \$1.6
20 billion, which the Court will have presumptively ruled as
21 Grace's legal liability for present and future claims. Then
22 one of two things is going to happen with respect to the trust.
23 Either the trust agreement and the TDP will have to provide
24 that the values and the criteria which Grace has persuaded the
25 Court to accept as the basis for the legal liability

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1 determination will have to be baked into the trust distribution
2 procedure so that the numbers will match. In other words, the
3 trusts -- the Court's valuation will be the same as the trust's
4 obligation to pay claims. That's one alternative.

5 The other alternative is that notwithstanding the
6 fact that the trust -- the Court found that Grace's legal
7 liability was \$1.6 billion minus X, the trust will wind up
8 having an obligation to pay more than \$1.6 billion minus X to
9 claimants when it resolves these claims over the many years
10 into the future that the trust will exist. In which event, the
11 claimant's will not get 100 cents on the dollar.

12 Those are the two alternatives. I personally can't
13 figure out any other way of doing it. Since the Grace plan
14 proposes to pay all its non-asbestos creditors 100 cents on the
15 dollar plus post-petition interest and proposes that a
16 shareholder should retain their equity interests, the second
17 possibility which is that the trust might not pay 100 cents on
18 the dollar can't work. Because it would violate the absolute
19 priority rule as well as potentially, depending upon how far
20 short it fell, potentially violate the unfair discrimination
21 provision code.

22 So the Court effectively can't confirm a plan that
23 would have that possibility in it. So that means basically the
24 only option here is that the trust is going to have to be
25 legally required only to pay those claims that the Court has

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1 or what have you, the same sort of specific causation issues
2 that are being addressed when we talk about, you know, do you
3 have enough asbestos in your lungs, do you have enough
4 exposure, et cetera, et cetera, to be a substantial
5 contributing factor to your disease. Those are specific
6 causations because they are addressing the individual claim.

7 And at the end of the day he never resolved any of
8 that. He just simply said I'm going to deny the estimation
9 motions. I'm going to consider the debtor's motion for summary
10 judgment on its omnibus objections and conditionally if he
11 denied the causation -- the summary judgment motion on general
12 causation he was going to send his opinion to the district
13 court as a recommendation as to how that court should proceed
14 to litigate -- liquidate those claims.

15 Now if we apply the Dow-Corning decision to this case
16 what does it tell us? Well it says first you can't use
17 estimation in the bankruptcy court which is where this
18 estimation proceeding is going on, can't use estimation to
19 impose the cap liability amount on a non-consenting class of
20 creditors in lieu of actual allowance or disallowance
21 procedures, which I might add Your Honor has repeatedly stated
22 that we are not allowing or disallowing claims. You have no
23 intention to do that and Grace in its papers has agreed that we
24 are not allowing and disallowing claims.

25 Even if there was some mechanism for avoiding the

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1 individual allowance, disallowance problems identified by Judge
2 Spector, this Court would at most have the power to rule
3 favorably to Grace on a summary judgment motion on an omnibus
4 objection to all asbestos claims on the ground that asbestos
5 doesn't cause disease. Not surprisingly, we haven't seen that
6 motion because there is no dispute that asbestos causes
7 disease. The dispute is if somebody -- does somebody have an
8 asbestos related disease and if they do, did exposure to a
9 Grace product constitute a substantially contributing factor to
10 the development of that disease? Both of which are the do you
11 have a disease is individual to the plaintiff, and do you have
12 exposure to a Grace product in sufficient amounts to have
13 contributed to that, to substantially contributed to that
14 disease?

15 Again it looks at the individual work history of the
16 individual claimant. So there is just no mechanism for
17 achieving even the theoretically possible result in this Court
18 that Judge Spector thought he might be able to achieve in Dow-
19 Corning. So under Dow-Corning if Grace actually wants to
20 litigate the merits of its liability for these claims in this
21 Court -- well first it can't do it in this Court. It would
22 have to have the district court withdraw the reference because
23 as we've noted earlier this Court doesn't have the power to,
24 either through estimation or otherwise address the allowance of
25 personal injury claims.

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1 Secondly, the district court would then have to
2 identify and determine the consolidate -- the so called common
3 issues and you would have to address what, if any, issues could
4 be addressed on summary judgment. You have to empanel juries
5 for all claims not summarily adjudicated and you then have to
6 try the resulting cases including individual issues such as
7 specific causation and damages.

8 Needless to say that is not what this Court
9 contemplates doing. And I would note in that connection that
10 the Rule 42 approach was (A) tried by Mr. Bernick in the
11 Babcock and Wilcox case or was proposed and after Judge Vance
12 inquired of Mr. Bernick how many cases over how many years was
13 she as the district judge who he persuaded to withdraw the
14 reference for this purpose going to have to spend on these
15 cases and they requested further briefing on that subject.
16 That was the last anybody heard about the 42 trial, case
17 settled.

18 Secondly, he also originally proposed to do it in
19 this case. But for reasons which I suspect have something to
20 do with his realization that it simply wouldn't work in
21 anybody's lifetime in this Court or Judge Woolan or whoever had
22 the case at the time wasn't going to be very receptive to that,
23 he withdrew that proposal. And instead he moved to have an
24 aggregate estimation. But when he moved to have an aggregate
25 estimation, he made sure to move to have an aggregate "merits

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1 based" estimation, notwithstanding the fact that that term
2 appears to have been invented by Mr. Bernick for purposes of
3 this case.

4 The only other case offered by Grace in support of
5 what it wants to do here is the one we heard about earlier
6 today which is the A.H. Robins case. The Court can read the
7 A.H. Robins case for itself. I submit to you that it is a
8 pretty slender read here.

9 First, the context of the case was in the fourth
10 circuit that the class of Dalcon Shield claimants whose claims
11 were being addressed in that estimation had voted 95 percent in
12 favor of that plan. Notwithstanding the fact that the
13 disclosure statement expressly stated that the payments to
14 claimants under that plan were going to be limited to the
15 amount being contributed for that purpose by the debtor, some
16 \$2.5 billion, that the estimation was inherently uncertain, and
17 that as a result it was possible that the claimants wouldn't
18 get their share of what that number was supposed to produce by
19 way of a recovery.

20 Indeed, the appeal was from a dissident group of
21 claimants and the actual grounds for appeal that they were
22 raising were 1129A(11) feasibility and 1129A(7) best interest.
23 And as for the feasibility objection since Robins was never
24 going to have to pay any more than the estimated amount and
25 since there was no dispute that it had the ability to pay the

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1 estimated amount, the feasibility objection is sort of
2 ridiculous on its face. Of course it was feasible. I mean,
3 all it had to do was pay the money and walk away. That was the
4 end of it.

5 There would be no subsequent claims against Robins
6 because they were being cut off, discharged. As for the best
7 interest test, the opinion is absolutely opaque as to what the
8 estimation issue was related to best interest. I mean, I can't
9 -- I don't know what it was. It certainly however didn't seem
10 to -- none of the issues, none of the arguments seem to involve
11 what we've got here which is a situation in which you had some
12 multi-expert, multi-disciplinary, multi-expert case that was
13 going to determine A.H. Robins legal liability for Dalcon
14 Shield claims for all time and all purposes in an aggregate
15 mass tort litigation. Instead what can be gleaned from the
16 opinion was there were a number of different experts much as
17 there are in asbestos cases who come in and testify that in
18 their opinion the aggregate amount of the liability based on
19 whatever criteria they chose to bring to that assignment is in
20 their judgment this horrible term that Mr. Bernick keeps
21 saying, their judgment X dollars and the district court chose
22 among them.

23 He came -- the district court came up with a number
24 which happens to conform to Francine Rabinowitz who is a
25 typical asbestos expert who comes in and uses the same

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1 methodologies that Dr. Peterson and Dr. Biggs use usually and
2 yeah, she didn't -- she used the questionnaires to determine
3 that some of the claims weren't valid and beyond that who
4 knows. But the bottom line is that number one, you can't tell
5 how it was done except to know it was done differently from
6 what Grace is doing here. And secondly, it was a battle among
7 estimation experts, not among doctors and industrial hygienists
8 and what have you.

9 The final thing, I have to say is I would suggest
10 that Your Honor read Judge Spector's view of what happened in
11 A.H. Robins which appears at 211 Bankruptcy Reporter at 601 at
12 Note 60. To put it mildly he had some questions about the
13 integrity of that entire process and how it played out. In any
14 event, the -- what is going on here is in our judgment a
15 fundamentally illegitimate use of Dalbert in this sort of mass
16 aggregation context.

17 What is going on here is the experts are being asked
18 to testify about albeit in a sort of combined fashion about the
19 legal validity of whole classes of claims against Grace. And
20 the -- as I've attempted to elaborate here the legal merits of
21 individual claims, even if they went into groups, is simply not
22 and cannot be an issue in this Court.

23 Secondly, the experts while it can give opinions
24 about medicine and risk analysis of law, excuse me, and
25 industrial hygiene they cannot come in here and usurp the

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1 powers of the court or the jury in telling the Court whether
2 claims are legally valid or not. But that is exactly what is
3 happening here because what you are being asked to take these
4 criteria that Grace is positing in here and do one of two
5 things with them through these experts.

6 One is since Dr. Florence simply zeros out everything
7 that they say isn't valid, that's a legal judgment. Because
8 the questions of what is the evidence needed to support a
9 personal injury claim at the end of the day is something that a
10 judge determines or a jury or a combination of the two. It's
11 not something -- and the expert can opine on the medicine and
12 the components of it. But they can't say and I'm right and
13 this claim isn't any good and that is what they are doing.

14 The alternative is what Grace might be arguing, is
15 that no other expert in the world could have credible
16 difference of opinion on these subjects. This is the Dalbert
17 angle. Dalbert as you know doesn't decide the law. I mean
18 Dalbert isn't a rule that says an expert that the trial judge
19 determines whether some expert's testimony is a correct
20 statement of law. Dalbert is an issue about whether or not
21 expert testimony is admissible in the trial of a contested
22 issue of fact. And if there is two sets of experts whose
23 testimony is both admissible then the trier of fact ultimately
24 decides on the basis of the particular case in front of it
25 which of those experts is more credible on the facts of that

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1 case.

2 Grace seems to be suggesting at points in its
3 argument that because it -- the experts in-house are so
4 credible and so persuasive and so credentialed that no other
5 expert could possibly be admitted in the case, in an individual
6 case to controvert their finding, if you will, that a plaintiff
7 not meeting their criteria doesn't have a valid case. And
8 again, that's not what this Court is here to do nor could it.

9 Even if in some way or another you could try and
10 argue that there was some basis for having this mass allowance
11 disallowance process done in this Court, the ACC and the FCR
12 aren't the parties that could do that. As the Kensington case
13 in the third circuit clearly held, the ACC and the FCR do not
14 -- excuse me, not the ACC, official committees do not bind by
15 their actions individual members of their constituency. And
16 while in the case, in that case the issue was whether they were
17 bound by failing to raise an objection or something and in
18 this case it is a different issue. The principle is the same.

19 We can't -- I remember at one point in one of the
20 charts Mr. Bernick had he said the ACC and the FCR could have
21 taken discovery on all of these claims. That was his response
22 to our argument that the personal injury questionnaires didn't
23 afford individual claimants the full panoply of protections
24 that they would normally have in a trial to get discovery
25 against the defendant. For example, to find product ID

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1 We've argued that in our papers The technical aspects
2 of why Rule 408 doesn't apply. Mr. Bernick's response in his
3 reply brief is pretty -- is a series of bullet points that
4 don't really provide any significant authority to The contrary
5 for The proposition that you can -- you could even admit all
6 these settlements as long as you are not trying to prove
7 liability for The invalidity of a claim or its amount. The
8 testimony here is not taking a particular settlement or group
9 of settlements from The past and saying Grace has legal
10 liability for these particular settlements in The future. Or
11 Grace has even legal liability for a case very similar to these
12 cases in The future.

13 It is simply a method of trying to figure out how
14 much money Grace, outside of bankruptcy, post bankruptcy if you
15 will, would have to pay for these cases. And Mr. Bernick spent
16 a lot of time talking about how conservative his experts are.
17 Well The fact of The matter is that This is an extremely
18 conservative assumption because as Mr. -- as The evidence will
19 show in This case The reason Grace settled cases, The reason
20 that virtually all asbestos defendants settled The vast
21 majority of cases against them, is that they have made a
22 determination that it is cheaper for them than to try The
23 cases.

24 Sure if they try The cases they will win a lot more
25 of them. But The problem is that The ones they lose they get

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1 killed. And as Dr. Peterson has pointed out in one of his
2 reports, he actually substituted The sort of -- The litigation
3 history which is The only thing resembling an actual merits
4 based history that Grace has. If you substituted that history
5 for The settlement based history as opposed to combining The
6 two wherein The judgments The verdicts get, because they are
7 such a small percentage, The effect of them is dramatically
8 reduced. But if you substituted them you would wind up with
9 Grace paying very, a lot fewer cases, a lot more money. And
10 The total Grace liability would be way, way higher than The
11 highest number that Dr. Peterson or Ms. Biggs has come up with
12 here.

13 There are also -- they've also tried to blow off The
14 notion that Rule 703 allows an expert to testify about things
15 that would be inadmissible as The basis for opinions. They
16 cite some cases. Read The cases, Judge, they don't support
17 that notion here. And particularly what they don't support is
18 whether Mr. Bernick likes it or not, The estimation methodology
19 utilizing This type of analysis is routinely used by experts in
20 This field for This purpose.

21 Now at their conclusions -- but the fact is it is
22 used and testified in a lot of cases that it is used outside of
23 litigations as I said earlier and under those circumstances for
24 them to use the same type of factual basis, whether it's
25 admissible as we say, or inadmissible, as they argue, is

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1 juries and the courts that have jurisdiction of those claims.
2 If you take what Grace is doing here at face value,
3 it never intended from the day it filed this case to use this
4 Chapter 11 proceeding for the normal purpose of restructuring
5 its business through arrangements with its creditors that the
6 Bankruptcy Code contemplates. In violation instead of the
7 spirit if not the letter of the Third Circuit's decision in the
8 SGL Carbon case, Grace is simply attempting to convert the
9 bankruptcy -- its bankruptcy case into a form of aggregate mass
10 tort litigation that it couldn't accomplish outside of
11 bankruptcy, and in the process it's basically trying to
12 convince this Court that the normal rules in claims allowance
13 that allow the claimant to -- you know, you've got to have an
14 objection to the claim.

15 I mean here under the bar date, Your Honor, Grace has
16 never objected to these claims. They're all deemed allowed
17 right now, because there's never been an objection filed. All
18 the claims were filed under POCs and the bar date. I mean,
19 obviously, they're not allowed, but I mean the whole notion of
20 a claim, an objection, a hearing, a right to defend yourself,
21 put your claim forward, a right to elect who your trial expert
22 is going to be as opposed to some guy who you might have gotten
23 some x-ray from while you were considering filing a lawsuit
24 against somebody, everything of that is just tossed out the
25 window, and it is simply not possible under the Bankruptcy

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1 Code. It's not a legitimate use of the Bankruptcy Code, and
2 I'm sure at the end of the day this Court will not countenance
3 it.

4 That said, I rather suspect that the Court is not
5 going to Daubertize any of the witnesses. We've been through a
6 process in some other cases before Your Honor, and so while I'm
7 going to turn the podium over now to others to address some of
8 that, particularly given the fact that Mr. Bernick didn't spend
9 a lot of time on most of the witnesses, hopefully, we will be
10 able to avoid having too much further discussion on that
11 subject. Thank you.

12 THE COURT: Mr. Finch.

13 MR. FINCH: Nathan Finch for the Asbestos Claimants
14 Committee. Don't show any graphics unless I tell you to.

15 The -- let's talk about what's not disputed here.
16 There is well-established epidemiology for the projected future
17 course of mesothelioma. Dr. Nicholson's projections, you heard
18 Mr. Bernick say that they were sound science.

19 Second, we know that 27 million Americans have been
20 occupationally exposed to asbestos.

21 Third, we know that Grace made asbestos-containing
22 products that were broadly used in a wide variety of places.
23 Their Monokote III, which is the asbestos spray on insulation
24 product, has been called one of the -- it become the dominant
25 fireproofing product in the country and was the focus of most

1 of the litigation. They also made insulating cement and made
2 acoustical plaster, all of which had chrysotile asbestos that
3 was infected with Trimolite from the Canadian mines. They
4 have --

5 UNIDENTIFIED SPEAKER: Excuse me. If you could just
6 lean a -- I can hardly hear.

7 MR. FINCH: Sure. Excuse me, Your Honor. They have
8 admitted that -- testified -- their witnesses have testified
9 that Grace products have been identified by plaintiffs as being
10 on any kind of construction or industrial site. It runs the
11 whole gamut except for possibly shipyards. And, in fact, they
12 have actually lost some cases arising out of shipyards.

13 So you've got this huge toll of disease nationwide.
14 The United States government statistics show that the
15 mesothelioma incidence rate, what they actually count, is still
16 going up. I mean it's basically been flat for a long time, but
17 it's still going up. We've got, you know, 26/27 hundred
18 mesothelioma deaths in the United States now. The death rate
19 from asbestosis is going up, and the number of people who die
20 from asbestosis is only a very small fraction of the people
21 actually ultimately who have the disease.

22 And so the question is how do you estimate that
23 liability on Grace's part. And I'm going to first talk a
24 little bit about their methodology and explain why -- in
25 addition to the reasons Mr. Lockwood articulated, why it's just

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1 not reliable and doesn't fit the law. What Grace is ultimately
2 trying to do is take Daubert and turn it into a substantive
3 rule of decision under state law. Forty-six states have
4 Daubert or a version of Daubert. They call it Havner in Texas.
5 They call it High in Maryland. But the point is the scientific
6 basis for getting an expert's report or expert's opinion in
7 front of a jury, there's a mechanism to challenge that or has
8 been for many, many years after 1993 and in some states before
9 that.

10 So what they're trying to do is they're trying to say
11 only if you believe our experts, are -- would any case
12 conceivably get to a jury, and that's making a factual
13 determination that -- it's going to depend on the facts and
14 circumstances of each of the 100,000 individual cases. You
15 can't do it globally, and they're inconsistent with the law.
16 And a couple of the cases that we cited in our reply papers,
17 I'll just read you the quotes.

18 The first is the Rutherford case from California,
19 which the substantive rule in California says, "If plaintiff's
20 prove causation in asbestos-related cancer cases by
21 demonstrating that the plaintiff's exposure to the defendant's
22 asbestos-containing product in reasonable medical probability
23 was a substantial factor in contributing to the aggregate dose
24 of asbestos the plaintiff or decedent inhaled or ingested and,
25 hence, to the risk of developing asbestos-related cancer."

1 There's no requirement that there's a doubling of the risk for
2 each exposure or each particular product.

3 The Berger vs. Amkin (phonetic) case, which is a case
4 in New York by the judge who has all of the asbestos cases in
5 New York, who listened to the testimony of Dr. Mogavkar, one of
6 Grace's experts here, and a lot of other experts trying to
7 Daubertize the -- or New York state law equivalent -- the
8 expert testimony from plaintiff experts in braverker cases,
9 which is a lower exposure and a different type of exposure than
10 the types of exposure we're talking about here. What the Court
11 wrote in that opinion, and this is at 818 New York South 2d
12 762, "Scientists and physicians use various means to establish
13 causation in particular situations, not the least of which are
14 toxicological and pathological studies and documented case
15 studies. While epidemiology may be the gold standard, it can't
16 be the only standard in an area where caution is both
17 particularistic and well established. Federal courts have also
18 held that epidemiological evidence is not necessary to
19 establish causation. It is not really important to have an
20 epidemiology study to determine whether the risk of cancer is
21 increased by asbestos exposure in every occupation."

22 That's what Grace is trying to do here. The ACC and
23 the FCR are going to call on medical experts, Dr. Laura Welch,
24 who is an industrial medicine doctor and an epidemiologist
25 who's run the largest screening epidemiological study of sheet

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1 metal workers, 17,000 workers over the past 20 years, Samuel
2 Hammar, a pathologist, a Dr. Rodwi (phonetic), another
3 pathologist, Arnold Brirody (phonetic), a cell biologist. All
4 of them basically take issue with Grace's threshold idea that
5 you need to have -- that only people who have personally mixed
6 or personally installed asbestos could be possibly be exposed
7 to enough Grace asbestos to cause their disease.

8 The fact is each case turns on its own individual
9 facts. The plaintiff in each of those cases would be able to
10 hire his or her own expert for the purposes of proving up a
11 case against Grace, and the medical literature -- there is
12 medical literature. Grace discounts the studies relied upon by
13 the doctors that the ACC and the FCR will put on, but the fact
14 is they do show an excess risk or a doubling or quadrupling of
15 the risk with fiber exposures down to well below one fiber a
16 year of exposure. And, you know, Grace can take issue with the
17 peer review medical literature, but that's a function of cross
18 examination that would come up in each individual case, and
19 Your Honor is not going to sit here and try 100,000 cases.

20 How much exposure and whether someone has an
21 asbestos-related disease turns on the facts and circumstances
22 of the case. And in a mesothelioma case -- and most of what
23 I'm talking about here is mesothelioma, and it's real --
24 there's not a dispute about the disease. It's just did the
25 defendant's asbestos contribute to the causation of the

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1 disease? And there's not -- it doesn't have to be that the
2 defendant's asbestos was the sole cause of the disease, or that
3 the defendant's asbestos doubled the risk, because it's
4 cumulative asbestos exposure which ultimately causes disease.
5 So that's their mix and install criteria for mesothelioma.

6 Another criteria they have is you have to have
7 radiologically diagnosable asbestosis in order to attribute
8 lung cancer to asbestos exposure. And the consensus medical
9 view by the Helsinki criteria, which is a group of experts with
10 over 1,000 years studying asbestos-related disease, have said
11 that you can have asbestos-related lung cancer if you have
12 sufficient exposure, but you don't need to have radiologically
13 diagnosable asbestosis. And, in fact, Grace's criteria don't
14 even permit someone to prove pathologically that they have
15 asbestosis, and I think Grace's experts would admit that if you
16 have asbestosis pathologically, it may not show up on an x-ray,
17 but you definitely have asbestosis.

18 And so even if you were to say that you need
19 underlying asbestos to attribute lung cancer to asbestos
20 exposure, which the medical literature says you don't need --
21 there's a lot of medical literature that says you don't need --
22 Grace's criteria rule out even the people who can prove it
23 pathologically.

24 The -- Mr. Bernick, quote, testified or talked about
25 various aspects of the tort system, and in the tort system --

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1 what people did and didn't do in the tort system. Whatever Mr.
2 Bernick says, whatever I say, whatever any of the lawyers say
3 up here is not evidence. We're going to -- you're going to
4 hear evidence from Steve Snyder, who's -- who has represented
5 companies in the tort system for over 20 years, from Dan Meyer,
6 who's a claims adjuster who's settled over -- he or his group
7 have settled over 200,000 asbestos claims, from Peter Krause
8 and John Cooney, who represent primarily mesothelioma victims,
9 about what the standards are in the tort system, what Grace
10 required in order to settle cases.

11 Mr. Bernick would have you believe that Grace settled
12 any case that came in the door without regard to whether it
13 posed a risk to it. In fact, for every case that Grace paid
14 money to -- and here I'd like to -- well, I'll pass on the
15 graphic. Grace required proof of exposure to a Grace product
16 sufficient to satisfy it and proof of disease to satisfy it,
17 and it paid the plaintiff the amount of money that was
18 something less than what he would recover at trial. Something
19 far less than what he would recover at trial, but both sides
20 are basically hedging their bets as to what might happen if
21 discover played out.

22 And the defense lawyers from Grace testified at
23 deposition, which is going to be their trial testimony -- since
24 they haven't been listed by witnesses, and we can't compel them
25 here by subpoena -- that the reason they chose to settle these

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1 cases and the standards they used to settle these cases was the
2 best way to minimize the liability.

3 MR. BERNICK: Yes, I'm reminded that the testimony
4 that Mr. Finch is reciting --

5 THE CLERK: I'm not picking you up, sir.

6 MR. BERNICK: I'm reminded that the testimony that
7 Mr. Finch is citing is testimony that was taken I believe
8 subject to a confidentiality order, because it relates to
9 settlement materials, and I believe that that was one of the
10 conditions pursuant to which we agreed to allow that discovery
11 to take place. So to the extent that Mr. Finch wants to get
12 into that, and I would I guess suggest that I believe that some
13 of this -- I'm not sure this is covered in the briefs, but to
14 the extent that Mr. Finch would want to get into it, I think
15 that we have an open court here, and I'm not sure that that
16 would be appropriate. I really don't want to spend a huge
17 amount of time on this, but I am compelled to point out that I
18 believe those are the terms of the order.

19 THE COURT: All right.

20 MR. FINCH: I'll pass that. That's the only
21 reference I'm going to have to this, Your Honor. I'm not going
22 to show any of the documents. Suffice it to say there's a lot
23 of them, and we'll put them into evidence at the appropriate
24 time.

25 We do have -- Grace did try some asbestos cases. It

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1 tried about 80 cases to judgment. It won about two thirds of
2 them, but the ones that lost, the judgments were catastrophic
3 compared to settlement averages.

4 Let's talk about the Peterson and Biggs estimation
5 methodology. The fact is that it is generally accepted in non
6 -- both in litigation and non-litigation settings. One of the
7 things we attached to our brief was an expert report from Tom
8 Florence in the Vellumoid case where he testified in the
9 Federal-Mogul cases this summer about Vellumoid's asbestos
10 liabilities, about the asbestos liabilities of Pneumo Abex,
11 about other asbestos liabilities, and in each and every one of
12 those reports he said, and I quote, that, "His estimates were
13 based on generally accepted forecasting methods and pre-
14 petition filing trends." And he goes on to describe, "The
15 forecasting processes incorporated the methods illustrated in
16 Nicholson and Perkel --" John, can we show this?

17 "The forecasting process incorporated the methods
18 illustrated in Nicholson, Perkel, and Selikoff, the courts have
19 accepted this or similar -- the same or similar methodologies
20 for forecasting future asbestos claims in numerous
21 proceedings."

22 And Dr. Peterson has studied asbestos litigation and
23 mast tort litigation for over 25 years. He's a Trustee of the
24 Manville Trust. He is a Trustee of the Fuller-Austin Trust.
25 He was a founding member of the Rand Institute for Civil

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1 MR. MULLADY: I'd like to begin, Your Honor, by
2 reminding the Court of the magnitude of Grace's liability to
3 future asbestos personal injury claimants. By the consensus of
4 all of the individuals who have estimated Grace's liability in
5 this case, the future claims liability is over 80 percent of
6 the total liability. Ms. Biggs has it at 90 percent. Mr.
7 Peterson has it at 89 percent. Even Dr. Florence, whose
8 estimate obviously is much lower, has it at 82 percent. And
9 Grace in its SEC filings most recently, it's 10k for the period
10 ending 12/31, 2000, projected that 84 percent of the liability
11 would fall in the future years.

12 Thus, Your Honor, if Grace's liability for asbestos
13 personal injury claims is channeled to a Section 524(g) trust,
14 by everyone's consensus over 80 percent of the assets in the
15 trust will be used to pay future claimants. For this reason,
16 the due process rights of future claimants who are absent
17 parties here are paramount. The U.S. Supreme Court has long
18 recognized that constitutional due process limits a court's
19 ability to rule on the merits of the claims of absent parties.
20 And that case is -- the case cite is Hansbury vs. Lee at 311 US
21 32, a 1940 case.

22 Thus, Your Honor, the due process rights of future
23 claimants limits this Court's ability to estimate Grace's
24 liability in a way that would involve ruling on the merits of
25 future claims. That's very important, yet this is what Grace's

1 estimation methodology contemplates. The Bankruptcy Code also
2 insures that the rights of future claimants are protected in
3 cases involving a 524(g) trust, as the Court knows. That
4 section provides that the trust, "will value and be in a
5 position to pay," present and future claims, "in substantially
6 the same manner."

7 So we've heard a lot about merits-based estimation,
8 but make no mistake Grace's estimation methodology does not
9 assess the actual merits of future claims. Instead it
10 arbitrarily eliminates thousands of future claims and in the
11 process tramples the due process rights of claimants that we
12 just talked about. Can we have Exhibit 4, Tom?

13 This is a chart from Grace's Daubert opposition brief
14 at Page 32. The sliver of pending claims after Grace's
15 winnowing process is shown right down here. They start with
16 pending claims here. They eliminate those without a proof of
17 claim. They further eliminate claims that do not meet their
18 exposure criteria, and this last one here, no asbestos-related
19 disease. So what starts as a pending group here of claims,
20 becomes this tiny sliver here. Exhibit 5, Tom, please.

21 After this winnowing process is completed, we have
22 the future estimate down here. The Nicholson disease inputs
23 curve is up here. The only way this delta gets as wide as it
24 is in the Grace estimation is if history is completely
25 disregarded and new criteria are imposed to screen out claims

1 that Grace traditionally paid pre-petition. And that is the
2 vagary of the process that they are using here with respect to
3 future claimants. So as to future claimants, the screening
4 process begins with the Grace PIQs, which were not completed by
5 future claimants, so the Court has no data on individual future
6 claims, only assumptions by Grace and their experts as to the
7 number of claims that will be filed, and a second assumption,
8 an unscientific prediction, about how many future claims will
9 be meritorious.

10 Now, we know that Dr. Florence allocates zero value
11 to thousands of future claims. This is undisputed. He does
12 this by failing to include large numbers of claimants in the
13 claim base that he uses for his future projections. But, as we
14 will see, his exclusions are unfair and deny claimants --
15 excuse me -- future claimants their due process rights.
16 Exhibit 6, please.

17 Now, Your Honor, this is a demonstrative. It's a
18 little bit playful. I hope Your Honor will give me a little
19 creative license here. But the concept is very, very serious,
20 and this is the best way I thought we could depict this. What
21 we show here in this first cut is a hypothetical game board.
22 The players are current asbestos personal injury claimants.
23 The object of the game is to reach the 524(g) trust here and be
24 eligible for compensation. Hypothetical future claimants are
25 shown here awaiting the outcome of the game, because under

1 Grace's estimation methodology their fate is dictated by the
2 ability of future claimants -- excuse me -- current claimants
3 to reach the finish line here.

4 So the first player begins and gets to the first
5 question did I file a POC, a proof of claim. He did not, and
6 his claim is not paid. The future claimants are affected by
7 this denial, because the exclusion of this player and many
8 other players who did not file a proof of claim or the many who
9 did file proofs of claim that Dr. Florence could simply not
10 match to the CMS database, they're all used to under estimate
11 the number of future claims. This in turn results in fewer
12 assets being allocated to the 524(g) trust under Grace's
13 estimation, and note that the money bag has shrunk somewhat.

14 Our next player proceeds through the claim filter but
15 is asked whether he entered his claim in CMS before the
16 petition date. He answers no, and he's denied payment. The
17 524(g) trust shrinks even more. Future claimants ask
18 themselves why the value of their claims suffers as a result.
19 They didn't have pre-petition claims. They were not
20 responsible for Grace not timely entering claims into CMS.

21 The next player, he's asked whether his PIQ said that
22 he personally mixed or personally installed a Grace asbestos
23 product. He answers no. His claim is denied, and future
24 claimants ask the question why should we be affected. We
25 didn't file a PIQ. His PIQ said he didn't personally mix or

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1 install. We weren't sent PIQs. We aren't bound by Grace's
2 exposure criteria by any court. Even if in the future a 524(g)
3 trust is established, what are the odds that Grace's exposure
4 criteria will be used? They're not the law that they state,
5 and the trust criteria will have to be negotiated between the
6 debtor and the personal injury claimants and the futures rep.
7 Next, please.

8 The next player gives the wrong answer to the
9 question whether he identified a Grace product in his PIQ
10 response. He's sent to the do not pay category. The trust
11 shrinks further. Future claimants wonder why they are being
12 affected by the response of a claimant to a PIQ where the
13 claimant's case had not been fully developed at the time of the
14 Grace bankruptcy petition and where the automatic stay
15 prevented that claimant from taking any discovery against
16 Grace.

17 The next player is a pending claimant who did not
18 comply with Your Honor's x-ray order. My goodness, we heard
19 enough about that order over the last two or three years. His
20 claim is denied. The trust shrinks further. The future
21 claimants ask themselves why their recovery's been diluted.
22 They weren't subject to the Court's x-ray order.

23 When all is said and done, Your Honor, and, of
24 course, many claimants can pass through the various Grace
25 liability filters and make it to a position where they're

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1 eligible for payment under the trust, but for every claimant
2 that doesn't make it, numbers of future claimants by
3 extrapolation for the Dr. Florence methodology will not receive
4 full compensation for their claims. And at the end of the day
5 the money that is not paid to the future claimants is returned
6 Grace shareholders. It moves over there. And what was once
7 the province of future claimants becomes the province of Grace
8 shareholders. This is the game that Grace is playing here, and
9 this is why we thought this demonstrative was a good way to
10 depict it.

11 The future claimants, Your Honor, will submit their
12 claims against the trust over the next 50 years. This Court is
13 bound to estimate Grace's liability by taking into account the
14 future and as yet unasserted claims against Grace, and those
15 claims must be treated fairly and equitably. As we just saw,
16 Dr. Florence's methodology does just the opposite.

17 Now, of course, Dr. Florence disclaims all
18 responsibility for the assumptions that underlie his
19 calculation of the number of pending and future claims. He
20 instead follows the lead of Dr. Elizabeth Anderson, who opines
21 that certain categories of claims, as we've heard, have
22 insufficient exposure to Grace products to have a plausible
23 claim against Grace.

24 Dr. Anderson eliminates all claimants except those
25 who personally mixed or personally installed Grace asbestos

1 products, as we've heard. Moreover, she does so in an
2 unscientific way, as I will discuss in a moment.

3 Now, Dr. Anderson in turn relies on Dr. Peter Lees,
4 who has computed the asbestos exposure rates for various
5 classes of Grace workers, but remarkably and unscientifically,
6 Dr. Lees does not even report the variations from the averages
7 that he calculates. That's an important point.

8 Now, Dr. Anderson also relies on Dr. Mugavkar. He's
9 the one who's collected the benchmark exposure levels to
10 asbestos that, according to Dr. Anderson, are then necessary to
11 attribute asbestos-related diseases to the exposure. Now, we
12 submit we've argued in our Daubert papers that Dr. Anderson's
13 opinion that only workers who personally mixed or personally
14 installed Grace asbestos products could have been exposed to
15 sufficient levels of asbestos to cause disease. We've argued
16 that that opinion is unreliable and inadmissible.

17 She arrives at this opinion by improperly assuming,
18 Your Honor, that the average asbestos exposure of cohorts in
19 each of the PIQ categories -- those categories that Mr. Bernick
20 referred to, A through F. She assumes that the average
21 exposure of the cohorts in those categories is representative
22 of all workers in that category. She does not account for
23 individual exposure levels at all.

24 So, for example, Dr. R.J. Lees underlying data shows
25 that the average exposure for a worker -- quote, worker -- is

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1 much higher than the exposure for a, quote, helper, and that
2 only makes sense, because the worker is more directly working
3 with the product than the helper in the same job category. Yet
4 Dr. Anderson uses the average of the workers and helpers, so
5 that, of course, dilutes the workers' exposure, and by doing
6 this what she does is she eliminates workers even though the
7 average exposures for the workers over 45 years exceed her
8 thresholds.

9 Now to make things worse, she ignores the fact that
10 not all workers in a category have average cumulative exposure.
11 Some have much higher than average cumulative exposures, but
12 she doesn't consider this, which is surprising. If Grace is to
13 be believed that what they're doing here is determining the
14 merits of individual claims on a claim-by-claim basis, then she
15 should be considering these claimants individually and not
16 grouping them and using averages.

17 Now, Your Honor, this is a complicated area of the
18 case. It requires some study. We recommend that the Court
19 carefully read the declarations of Professor Eric Stallard that
20 are attached to the FCR's Daubert papers. Professor Stallard's
21 an expert in demographic risk modeling. In his declarations he
22 explains the importance of accounting for heterogeneity, which
23 is the differences in individual exposures, and he explains how
24 important it is to account for heterogeneity when studying the
25 exposures of individual members of a population, which is what

1 Grace purports to be doing here. Instead, Dr. Anderson's
2 calculating average exposures and ignoring everyone above the
3 average.

4 Now, Professor Stallard also exposes as unscientific
5 and flawed Dr. Anderson's assumption that workers in the same
6 job categories will have, quote, independent exposures. Now,
7 this is a different concept, but it's equally important. So,
8 in other words, she assumes that each day that a worker in one
9 of her groups comes to work, and he has an equal chance of
10 doing any of the jobs in the work category as any other worker
11 just as every flip of a coin has an equal chance of coming up
12 heads as it does coming up tails. That's the independence
13 assumption. So under Dr. Anderson's assumption an exposed
14 worker has an equal chance of doing the job of a helper on any
15 given day, and that's just counterfactual.

16 Dr. Stallard explains why the independence assumption
17 is not scientifically valid, and it's not consistent with
18 accepted scientific practice for the purpose of rejecting
19 individual claims on the premise that they have insufficient
20 exposures to asbestos to cause disease. Your Honor, this is
21 very important. If Dr. Anderson's independence assumption is
22 wrong, then her exclusion of thousands of claimants is wrong,
23 and Dr. Florence's estimate is wildly inaccurate and
24 unreliable.

25 I'd like to talk about Ms. Biggs' methodology. We